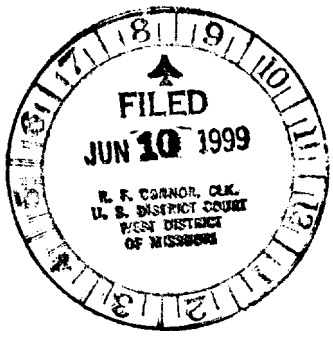

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

B. JEAN WEBB,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-3306-CV-S-RGC-ECF
	)	
CITY OF REPUBLIC, MISSOURI,	)	
	)	
Defendant.	)	

MOTION TO STRIKE PORTIONS OF PLAINTIFF'S REPLY SUGGESTIONS TO DEFENDANT'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR. IN THE ALTERNATIVE. FOR EITHER AN ORDER ACCEPTING DEFENDANT'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TIMELY FILED OR AN ORDER GRANTING LEAVE TO FILE SAME OUT OF TIME WITH SUGGESTIONS IN SUPPORT

Defendant moves this honorable Court to strike portions of Plaintiffs "Reply Suggestions to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment" ("Plaintiffs Reply") or, in the alternative, for either an Order accepting Defendant's Suggestions in Opposition to Plaintiffs Motion for Summary Judgment ("Suggestions in Opposition") as timely filed or an Order granting leave to file same "out of time", pursuant to Fed. R. Civ. P. 6 (b)(2), should this Court find that Defendant failed to file its Suggestions in Opposition in a timely manner.

Defendant would respectfully state to the Court the following particular grounds for relief

(1) A portion of Plaintiffs Reply should be stricken, namely that portion wherein Plaintiff urges this Court to refuse Defendant's Suggestions in Opposition. (Plaintiffs Reply, ¶ 1). As a matter of course, a party moving for summary judgment routinely gets "two bites at the apple" under Local Rule 7.1 (c) & (e). Once the non-moving party has responded to the original motion, the movant may then "reply" to that responsive document. In this instance, that process was completed by the filing of Plaintiffs Reply. Normally, such a reply is appropriately the final paper filed in this sequence. In Plaintiffs Reply, however, she alleged that Defendant had failed to file

its Suggestions in Opposition in a timely fashion. Under Local Rule 7.1 (c) & (e), this places Defendant in the untenable position of having no mechanism by which to respond to Plaintiffs incorrect charge of untimeliness. If Defendant cannot answer Plaintiffs assertion, then that portion of Plaintiffs Reply making the assertion (Plaintiffs Reply, ¶ 1) should, in fairness to Defendant, be stricken.

(2) Alternatively, Defendant requests that the Court issue an order accepting Defendant's Suggestions in Opposition as timely filed.

(3) Should this Court decline the relief heretofore requested, it should in its discretion, permit the filing at this time, under Fed. R. Civ. P. 5 (d), upon a showing by Defendant of "excusable neglect. "

(3) In filing its Suggestions in Opposition Defendant relied upon a reasonable, good faith interpretation of the federal and local rules governing this matter.

(4) A reasonable, good faith interpretation of the applicable rules, especially where a local rule may well be inconsistent with its federal counterpart, can suffice to show "excusable neglect."

(5) Defendant met the deadline for *service* in this matter by serving a copy of its Suggestions in Opposition upon opposing counsel on May 20, 1999, pursuant to Fed. R. Civ. P. 6 (a) and (e).

(6) Defendant's filing of its Suggestions in Opposition with the Court was on May 2 1, 1999, the day after service on opposing counsel. This was timely under Fed. R. Civ. P. 5 (d) which permits parties responding to a motion a "reasonable time" *after* service on opposing counsel, in which to file the response with the court.

(7) While Local Rule 7.1 (d) states that the deadline for filing is the same as that for service, this is more restrictive than -- and potentially inconsistent with -- the more liberal provision of Fed. R. Civ. P. 5 (d). When local rules conflict, or are inconsistent with, federal rules of civil procedure (or cannot be read so as to be consistent), the federal rule takes precedence, pursuant to Fed. R. Civ. P. 83 (a)(l).

(8) Defendant's reliance on Fed. R. Civ. P. 5 (d) was reasonable and in good faith; it was not an attempt to circumvent any of the rules of this Court.

(9) The delay in filing, if any, was merely one day. Such an insignificant delay, especially when the result of ambiguous and conflicting rules, should not form the basis for refusing Defendant's Suggestions in Opposition to Plaintiffs Motion for Summary Judgment.

Suggestions in Support

As a threshold matter, this Court must determine whether this motion is proper, Defendant believes this motion is both proper and necessary. As to the motion to strike Plaintiffs Reply, it is true that Fed. R. Civ. P. 12 (f) only expressly provides for a motion to strike a *pleading*, and that motions are generally not viewed as "pleadings." Indeed, many courts and scholars have argued that a motion to strike motions and other papers will not lie. 2 Moore's Fed, Practice 3d § 12.37 [2] and cases cited therein [hereinafter, "Moore's Fed. Practice"]. However, some jurisdictions have allowed such motions. See, e.g., Propriety of Motion to Dismiss Motion, 3 Fed. R. Serv. (Callaghan) § 7b.6; and King v. Twp. of East Lampeter, 17 F. Supp.2d 394, 406 (E.D. Pa. 1998).

The standard used by a number of courts for granting a motion to strike is whether a denial of such a motion will prejudice the moving party. 27A Fed. Proc. L. Ed. § 62:436 and cases cited therein. In this instance, this standard is clearly met.[1] If Defendant's Suggestions in Opposition are refused, Defendant's case will be severely damaged, though it should be pointed out that this Court would still be required to make an independent assessment of the record, both as to whether a genuine issue of material fact exists and as to whether Plaintiff is entitled to summary judgment as a matter of law, so that it could not grant Plaintiffs Summary Judgment Motion merely on the basis of Defendant's failure to file its Suggestions in Opposition in a timely

[1] Other courts have used a two-pronged standard, denying motions to strike unless the movant would be prejudiced thereby *and* the material to be stricken is wholly irrelevant to the issues in the case. See Quigley v. General Motors Corp., 647 F. Supp. 656 (D. Kan. 1986). However, these cases typically involve motions to strike actual pleadings such as complaints. The relatively low threshold for articulating a cause of action under Fed. R. Civ. P. 8 (a) (a "short and plain statement") may well explain courts' reluctance to grant motions to strike.

manner. 27A Fed. Proc. L. Ed. § 62:648, citing Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

However, the Court's refusal of Defendant's Suggestions in Opposition would leave the Court without the benefit of Defendant's perspective on the case and without the advantage of Defendant's legal argument. This will result in severe prejudice to Defendant in that the Plaintiffs Motion for Summary Judgment will be much more likely to be granted without the merits or equities of the case having changed one iota. And the sole reason for the increased likelihood will have been the Court's inability to receive Defendant's Suggestions which, in turn, will have been caused solely by Defendant's inability to respond to Plaintiffs incorrect claim that the Suggestions in Opposition were untimely filed.

As to the motion to grant an order accepting Defendant's Suggestions or leave to file out of time, there is a growing awareness that motion practice in the federal courts must accommodate the complexities of the case. Therefore, some courts and scholars have recognized "undifferentiated motions," i.e., motions not provided for by any specific rule but which are necessary for a party to file in order to receive necessary relief See e.g., 5 Wright & Miller Fed. Proc. (2d. ed. 1987) § 1199 [hereinafter, "Wright & Miller"], and Gordon v. Heimann, 715 F.2d 531, 534 n. 6 (11 th Cir. 1983). Clearly, any request for an Order granting relief must be made by motion. Fed. R. Civ. P. 7 (b)(l).

As for Plaintiffs legal contention that Defendant's Suggestions in Opposition were filed "three days too late," (Plaintiffs Reply, ¶1), Defendant would respectfully point the Court's attention to several matters. To support her contention, Plaintiff cited Fed R. Civ. P. 6 and Local Rule 7.1(d) (Plaintiffs Reply ¶1), but failed to cite Fed. R. Civ. P. 5 (d). Moreover, while Plaintiff calculates Defendant's Suggestions in Opposition to have been due on May 18, 1999, she inexplicably failed to take note of controlling precedent to the contrary, namely Treanor v. MCI Telecommunications Corp., 150 F.3d 916, 918 (8th Cir. 1998). Indeed, it is Defendant's position that the assertion should not even have been made under Treanor. However, having made the

assertion, Plaintiff at a minimum, should have brought Treanor to this court's attention and attempted to distinguish it-although Defendant does not believe it is distinguishable.

In claiming that Defendant's Suggestions were due on May18, 1999, (Plaintiffs Reply, ¶ 1), Plaintiff misapplies the provisions of Fed. R. Civ. P. 6, specifically subsections (a) and (e). Plaintiff would apparently have this Court add the extra three days provided for under Rule 6 (e) to the twelve days allowed under Local Rule 7.1 (d), giving Defendant fifteen days in which to respond, starting with Plaintiffs filing of her motion on May 3, 1999 and ending on May 18, 1999

Defendant, on the other hand, computed the time allowed as follows: starting on May 3, 1999, Defendant added the twelve days allowed under Local Rule 7.1 (d), bringing the due date to May 15, 1999. That day, however, fell on a Saturday. Rule 6 (a) provides that when computing a deadline of eleven days or more, weekends and legal holidays must be counted but that if a deadline falls on a weekend, the party may consider as its deadline the next day that is not a weekend or legal holiday. In this case, that day was Monday, May 17, 1999. Defendant thus considered May 17, 1999 to be the proper computation under Rule 6 (a). Defendant then added to that period the three extra days permitted under Rule 6 (e) when responding to papers served by mail, making May 20, 1999 the final date for service of Defendant's Suggestions in Opposition on Plaintiff.

While the precise interplay between Fed. R. Civ. P. 6 (a) and 6 (e) has bedeviled courts and scholars for quite some time, see Wright & Miller §§ 1162, 1171 and cases cited therein, the Eighth Circuit Court of Appeals settled the issue for all courts within the Eighth Circuit just last year. In Treanor v. MCI Telecommunications Corp., 150 F.3d 916, 918 (8th Cir. 1998), that court prescribed the method of computation under Rule 6: a responding party must *first* compute the period under 6 (a), and ***then*** add the three days under 6 (e). That is exactly the method used by Defendant in this case. That court was urged to take Plaintiffs approach to Rule 6, but soundly rejected it in favor of Defendant's approach.

The only possible basis for distinguishing this controlling precedent from the present case is that the time computation in Treanor was one of ten days or less, whereas Defendant's time

period in the instant case was eleven days or more. Fed. R. Civ. P. 6 (a) (discussing different treatment of these two time periods). It is true that the shorter time period has been even more vexing to courts and commentators than the longer. See Wright & Miller § 1171 and cases cited therein. However, upon careful examination, Treanor cannot be distinguished from the present case on that ground.

First, the precise holding on the time computation question was that the Rule 6 (a) period is calculated first and then the Rule 6 (e) period is added. In the opinion, there is no express or implied limitation of the mandated method to ten-day-or-less calculations. Second, the authority relied upon in Treanor is in full support of the view that the Treanor court's method of computation should apply to all time periods. In particular, the Treanor court cited and followed the decision in Lerro v. Quaker Oats, 84 F.3d 239 (7th Cir. 1996), and adopted that court's rationale and test for this method of computation. Although Quaker Oats also involved a less-than-ten-day period, its rationale and test apply equally well to any time period. The rationale, quite simply, is that no party should be penalized for having been served by mail, instead of by hand. The test is to determine what date service would have been due if the party had been served by hand; then see which of the two disputed time computations brings about the better result with regard to allowing three additional days due to service by mail.

In the instant case, had Plaintiffs Motion for Summary Judgment been hand-served on Defendant, Defendant would have had until May 17th to respond since May 15th was a Saturday. Under Plaintiffs method of computation, Defendant would have been required to respond by the 18th, giving Defendant only one additional day to compensate for being served by mail. Under Defendant's method of computation, Defendant had until the 20th to serve its response on opposing counsel, allowing three additional days to compensate for delivery by mail. Defendant's method is exactly in keeping with the letter and the intent of Fed. R. Civ. P. 6 and is now the method prescribed by the Eighth Circuit.

Thus, under Local Rule 7.1 (d), Defendant was required to serve and file its Suggestions in Opposition on May 20, 1999. Defendant did serve its Suggestions in Opposition on May 20,

1999. Defendant filed its Suggestions in Opposition the next day, May 21, 1999. Local Rule 7.1 (d) states that suggestions in opposition to a motion shall be served and filed within twelve days of receiving them and, under this provision, Defendant's Suggestions in Opposition could be viewed as having been filed one day -- not three days -- after the due date specified by Local Rule 7.1 (d). However, in mandating a fixed number of days in which to respond to a motion for summary judgment, Rule 7.1 (d) may well be inconsistent with Fed. R. Civ. P. 5 (d) which permits such papers to be filed within a "reasonable time" after service on opposing counsel.

This apparent inconsistency is important because Fed. R. Civ. P. 83 (a)(1) states that local rules "shall be consistent with . Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075," including the Federal Rules of Civil Procedure. Thus, although as a general matter local rules are binding on the parties, Silberstein v. I.R.S., 16 F.3d 858, 860 (8th Cir. 1994), it is also true that "[l]ocal district court rules cannot be construed in such a way as to render them inconsistent with applicable provisions of the Federal Rules of Civil Procedure." Jaroma v. Massey, 873 F.2d 17, 20 (1st Cir. 1989). If a local rule is, in fact, inconsistent with a federal rule it "cannot stand." Porter v. Fox, 99 F.3d 271, 274 (8th Cir. 1996). Indeed, a local rule mandating a specific number of days in which to file after service is "[a]t least arguably .. inconsistent with the intent of Rule 5 (d), [and] [i]nconsistent local rule[s] are invalid under both Rule 83 and the Rules Enabling Act. " Moore's Fed. Practice § 5.3 1[2]. Such rules are inconsistent with federal rules because they arbitrarily deny parties and courts the "discretion and flexibility" parties were intended to have by the drafters of the federal rules. Id.

Thus, this Court has available to it several options. It could interpret Local Rule 7.1 (d) as *consistent* with the Federal Rules of Civil Procedure, i.e., it could read the rule to mean that Defendant's Suggestions in Opposition had to be *served* on May 20, 1999 as per Fed. R. Civ. P. 6 (a)& (e), but that they could be *filed* within a reasonable time thereafter as per Fed. R. Civ. P. 5 (d) (in other words, read the word "filed" out of Local Rule . 7.1 (d) to render it consistent). Alternately, this Court could decide that Local Rule 7.1 (d) is inconsistent with Fed. R. Civ. P. 5 (d), that it "cannot stand" Porter v. Fox, 99 F.3d 271 (8th Cir. 1996) and that, therefore,

Defendant acted properly in following the provisions of Fed. R. Civ. P. 5 (d), not Local Rule 7.1 (d). In either event, Defendant's Suggestions in Opposition were timely filed pursuant to Fed. R. Civ. P. 5 (d), in that filing one day after serving Plaintiff is filing within a reasonable time.

Courts have "liberally construed the words 'reasonable time' in order to minimize the incidence of technical objections that a paper, although served in ample time, was not filed at the proper time." Wright & Miller § 1152. Indeed, one district court (Northern District of Illinois) allowed only one day after service for the filing of a responsive paper and *this* rule has been described as "a rigorous time requirement" and as being of "questionable validity" under Rule 83. Id., n. 10. Rules such as these are of questionable validity because they do not comport with the clear intent of Fed. R. Civ. P. 5 (d) which allows parties a "reasonable time" in which to file, after accomplishing service on an opposing party. One court has held that a delay of *six* days was reasonable under Rule 5 (d). See Katz v. Mornenthau, 709 F. Supp. 1219, 1226 (S.D.N.Y. 1989) (the court stating there was "no reason to find the six day delay unreasonable" where an answer to a motion for default judgment was filed six days after service on the movant). In view of the foregoing, the one day delay in this case between service on opposing counsel and filing with the court is reasonable, and not cause for refusing Defendant's Suggestions in Opposition.

This Court also has a third avenue by which it can accept Defendant's Suggestions in Opposition as timely filed. This Court has "considerable leeway" as to when and how to enforce its local rules, and is allowed to permit "departures" from its rules when it sees fit. Silberstein v. I.R.S., 16 F.3d 858, 860 (8th Cir. 1994). Thus, in order to avoid the conflict between the Federal Rules of Civil Procedure and the local rules and/or to avoid extreme prejudice to Defendant, this Court may simply accept Defendant's Suggestions as timely filed.

Should this Court reject the above contentions as to timeliness, it should issue an Order granting Defendant permission to file its Suggestions in Opposition "out of time" and accept the Suggestions in Opposition already sent to the Court for that purpose. When considering a motion for leave to file "out of time" a court should take into account a "matrix of factors," including (1) the significance of the delay; (2) any prejudice to the opposing party; and (3) whether the movant

has acted in bad faith. Moore's Fed. Practice § 6.06 [3][b], citing In re Prudential Sec., Inc., 158 F.R.D. 301, 303-04 (S.D.N.Y. 1994).

In this case the delay, if any, is insignificant, if significance is measured by how far past the deadline the document was tiled. As noted above, Defendant filed its Suggestions in Opposition with this Court only one day after serving them on opposing counsel. Moreover, Plaintiff will not be prejudiced in any way by granting Defendant leave to file its Suggestions in Opposition. Indeed, Plaintiff made no claim in her Reply to Defendant's Suggestions in Opposition of any such prejudice. Moreover, even if Defendant were deemed untimely in its filing of same, such untimeliness did not, in any way, limit Plaintiffs opportunity to mount a full response to Defendant's Suggestions in Opposition. In the absence of any prejudice to Plaintiff, this Court should grant leave to file Defendant's Suggestions in Opposition at this time. See Wilson v. United States, 112 F.R.D. 42 (N.D. Ill. 1986) (the court holding that the government's technical violation of Rule 6 did not justify a denial of its motion as untimely, as the plaintiff had not alleged any prejudice by the allowance of the untimely filing).

Finally, there is no suggestion by Plaintiff, nor is there any basis for concluding, that Defendant acted in bad faith by filing its Suggestions in Opposition when it did. Defendant has proceeded under a reasonable, good faith interpretation of the applicable rules, including Fed, R. Civ. P. 5 (d), 6 (a) & (e), and Local Rule 7.1 (d), and a reasonable, good faith reading of the applicable rules, provides a basis for finding "excusable neglect" in the event this Court deems Defendant's filing to have been untimely. See Moore's Fed. Practice § 6.06 [3][b] and cases cited therein.

Finally, this court should take notice of the very liberal reading of Rule 6 (b)(2) mandated by the United States Supreme Court and by the Eighth Circuit Court of Appeals. In Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnershiu, 507 U.S. 380, 389 (1993), the Supreme Court adopted a "flexible understanding of 'excusable neglect,"' one which includes not only circumstances "beyond the control of the filer" Id. at 391, but one that may include "inadvertent delays." Id. at 392 (a case involving rules of bankruptcy procedure, but Court articulating

standard for excusable neglect in context of federal rules as well). The Court found it to be quite clear under Rule 6 (b) that the concept of "excusable neglect" is a "somewhat elastic concept." Not only has the Supreme Court taken this view, but the Eighth Circuit Court of Appeals has adopted it as well, overruling all earlier cases to the contrary. See In re Jones Truck Lines. Inc., 63 F.3d 685, 688 (8th Cir. 1995) (citing the "Pioneer factors" in its determination of whether a party had shown "excusable neglect" in a bankruptcy context). See also Fink v. Union Central Life Ins. Co., 65 F.3d 722, 724 (8th Cir. 1995) (adopting the Pioneer interpretation of "excusable neglect" for Fed. R. App. P. 4 (a)(5)). In Fink, the Eighth Circuit explicitly overruled "past decisions interpreting excusable neglect [that] appl[ied] an unduly strict standard in conflict with Pioneer. ..." Id.

WHEREFORE, Defendant moves this Court strike that portion of Plaintiffs Reply in which she alleges Defendant was late in filing its Suggestions in Opposition or, in the alternative, for either an Order accepting Defendant's Suggestions in Opposition to Plaintiffs Motion for Summary Judgment as timely filed or an Order granting Defendant leave to file its Suggestions In Opposition "out of time," pursuant to Fed. R. Civ. P. 6 (b)(2), in the event this Court deems Defendant's original filing to have been untimely.

Respectfully submitted, this&day of June, 1999.

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Certificate of Service

I hereby certify that I have served a true and correct copy of the foregoing document on counsel for Plaintiff, Stephen Douglas Bonney, Esq., 215 West 18th Street, Kansas City, MO 64108, on this the 10TH day of June, 1999, via U.S. Mail, postage prepaid.

David R. Huggins

David R. Huggins